BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TOBIE J. CENTLIVRE Claimant VS. **MATTHEW WURM d/b/a** **WURM CONSTRUCTION** Respondent AND **KANSAS WORKERS COMPENSATION** **FUND**	)	Docket No. 1,053,502

ORDER

STATEMENT OF THE CASE

Claimant requested review of the February 9, 2011, Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. The uninsured respondent appeared pro se by its owner, Matthew Wurm. John F. Carpinelli, of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The Administrative Law Judge (ALJ) found that claimant's accident of October 28, 2010, was not covered under the Workers Compensation Act because respondent did not have a $20,000 payroll and because claimant was not an employee of respondent.

The record on appeal is the same as that considered by the ALJ and consists of the discovery deposition of Tobie Centlivre taken January 21, 2011, and the exhibits[1]; the evidentiary deposition of Matthew Wurm taken January 21, 2011, and the exhibit; and the transcript of the February 8, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues that he was an employee of respondent and his accidental injury arose out of and in the course of that employment. Claimant further asks the Board to find

[1] This deposition was made a part of the record by agreement of the parties. P.H. Trans. at 7.

that respondent implicitly had a payroll of $20,000 in 2010 or that it would be reasonable to expect respondent to have a payroll over $20,000 for the year 2010.

The Fund argues that claimant failed to prove he was an employee of respondent or that his accidental injury arose out of and in the course of his employment. Further, the Fund argues that claimant did not prove that respondent had a payroll of more than $20,000 for the year 2010.

The pro se respondent did not submit a brief.

The issues for the Board's review are:

(1) Did respondent have a sufficient payroll to be subject to the Workers Compensation Act?

(2) Was claimant an employee of respondent on October 28, 2010? If so, did his accidental injury arise out of and in the course of his employment?

FINDINGS OF FACT

Claimant was injured on October 28, 2010, when he fell off the roof of a house on which respondent was performing work. He suffered a compression fracture and was taken by ambulance to the hospital. Respondent had no workers compensation insurance coverage.

Matthew Wurm, respondent, is in the home repair and construction business and does business as Wurm Construction. It is not a corporation or an LLC. Its bank account is set up as Matthew Wurm doing business as Wurm Construction. Mr. Wurm testified that he has never had any employees. He did not list any labor costs on respondent's 2009 taxes, and he said he would not list any labor costs on its 2010 taxes. Mr. Wurm testified that at times friends and family members have helped him with work on jobs, but none of those friends or family members were ever paid by respondent. Mr. Wurm testified that he will do work for friends, such as fixing cars, and sometimes those friends will, in turn, help him on one of his jobs.

Both claimant and Mr. Wurm agreed that they met in September 2010, when claimant's wife asked Mr. Wurm to do some repair work on her minivan. Claimant's wife paid for the parts to repair her minivan, but Mr. Wurm did not charge her anything for the work he performed.

In October 2010, Mr. Wurm received a telephone call from claimant asking him about working on claimant's car. At the preliminary hearing, Mr. Wurm testified that he paid about $280 for parts to repair claimant's car and may have performed about $2,000

worth of labor while working on the car.[2] Mr. Wurm said he fixed claimant's car out of the goodness of his heart but that he and claimant had a loose arrangement where claimant did not have to pay him for the car repair but would help Mr. Wurm on a roofing project he was conducting in Stull, Kansas. Claimant testified that there was no agreement between him and Mr. Wurm that claimant was helping on the job site in order to work off a debt. Claimant said he first went to the job site in Stull, Kansas, sometime between October 15 and October 20. Mr. Wurm said that claimant first showed up at the job site on October 21 but did not stay over an hour. Claimant said he believed Mr. Wurm fixed his car so that claimant would be able to give respondent's employee, Rory Steele, rides to and from the job site as Mr. Steele did not have a driver's license. Mr. Wurm denied this.

Mr. Wurm testified that he did not tell claimant how many hours of work he owed to pay off the work he did on claimant's car. He did not set any hours for claimant to work and said claimant could come and go at his leisure. The agreement Mr. Wurm made with claimant was that he fixed claimant's car, and claimant could show up at the job site when he could. Mr. Wurm would then call the repair bill on the car even. Mr. Wurm did not have an employment contract with claimant and never told him he would be claimant's boss.

Claimant testified that he was a full-time employee of respondent and was being paid $10 per hour for the work he was performing on the house in Stull. He said Mr. Wurm told him he had other projects lined up to do after the work in Stull was completed. Mr. Wurm denied those contentions. Claimant testified that Mr. Wurm told him he had a lot of work because it was only him and one other employee, Mr. Steele. Both Mr. Wurm and Mr. Steele testified that Mr. Steele was not an employee of Wurm Construction. Mr. Steele said that he and Mr. Wurm had been friends for several years and did favors for each other. Mr. Wurm had worked on his car in the past, helped his mother remodel her basement, and helped him move some stuff. Mr. Wurm had also given Mr. Steele $200 when one of his children was born and $280 in December 2010 so he could purchase Christmas gifts for his children. But Mr. Steele denied he was an employee of respondent or that he was ever paid for any work he did for Mr. Wurm at any time.

Mr. Wurm said the job at Stull was not being performed by Wurm Construction. Mr. Wurm was doing the work on the house in Stull for the father of a friend. Although Mr. Wurm was being paid for the expenses he incurred for materials and gas, he was not being paid for the labor he was performing on the house.

After claimant's accident, his wife called Mr. Wurm and told them claimant did not have money for medication. Mr. Wurm went to claimant's house and gave him $220.[3]

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[2] In Mr. Wurm's discovery deposition, he stated he believes he did about $1,000 worth of work on claimant's car.

[3] Claimant testified he was given $220, but Mr. Wurm said he only gave claimant $200. However, he said he might have miscounted the bills he handed to claimant.

Claimant said he believes the $220 was payment for 22 hours of work at $10 per hour. He believes he worked more than 22 hours but that Mr. Wurm took money out of his pay for the work he did on claimant's car. Mr. Wurm admitted that he kept track of the number of hours claimant worked but only to track in his mind how much work claimant was doing in comparison to the work he did on claimant's car. He believes claimant may have worked a total of 30 hours at the Stull job site.

When Mr. Wurm gave claimant the $220, claimant gave Mr. Wurm an SRS document that he asked Mr. Wurm to sign indicating that claimant was an employee. Mr. Wurm took the document to SRS and spoke to someone there. He said he told the SRS personnel that claimant had never been his employee, and the SRS personnel then took the form and told Mr. Wurm they would take care of the matter. Mr. Wurm never signed the document, stating he would not sign it because claimant was not and had never been an employee.

Claimant also testified that Mr. Wurm fired him on the day he came over and gave him the $220. Mr. Wurm testified that he did not fire claimant because he had never hired him. He testified the money he gave claimant was not compensation for work but was a gift. He did not expect claimant to pay that money back.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-505 states in part:

> (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
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> . . .
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> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection; . . . .

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

The ALJ did not find credible claimant's testimony that he was hired as a full time employee by respondent to work at $10 per hour for 40 hours per week. Instead, she concluded that claimant and respondent exchanged work for each other in an informal barter arrangement and not in an employer/employee relationship. The ALJ further found that claimant failed to prove that respondent had a total gross annual payroll of over

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[4] K.S.A. 2010 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2010 Supp. 44-555c(k).

$20,000 for either the 2009 or 2010 calendar years exclusive of the wages paid to Matthew Wurm himself. As such, she held claimant's accident was not covered by the Kansas Workers Compensation Act. This Board Member agrees. Mr. Steele denied being an employee of respondent and denied being paid for the work he performed for Mr. Wurm. Rather, Mr. Steele and Mr. Wurm did work for each other as friends and not for pay. There is no persuasive evidence that respondent had any other employees or paid any wages other than to Mr. Wurm himself. As such, even if an employer/employee relationship existed between claimant and respondent, the employment was not subject to the Workers Compensation Act. There is no evidence of any payroll in 2009, which was the preceding calendar year, *i.e.*, the calendar year before claimant's accident. And there is no evidence that respondent could reasonably be expected to have a gross payroll of over $20,000 for the 2010 calendar year. Claimant did not do any work for respondent until on or about October 21, 2010, which left insufficient time in 2010 for claimant to have earned $20,000 at $10 per hour.

CONCLUSION

Claimant has failed to prove that respondent had a payroll sufficient to be subject to the Kansas Workers Compensation Act. As such, the remaining issues are rendered moot.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated February 9, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John F. Carpinelli, Attorney for Kansas Workers Compensation Fund
Matthew Wurm, 3727 S.W. Munson, Topeka, Kansas, 66604
Rebecca Sanders, Administrative Law Judge